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No. 00-0054

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO,

Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Pueblo filed its Petition for Certiorari on July 10, 2000. In its petition, the Pueblo indicated that neither the November 13, 1988 order of the United States District Court for the Western District of Texas dismissing the case on Eleventh Amendment grounds, nor the April 10, 2000 opinion of the Court of Appeals affirming the dismissal were reported. A footnote to the per curiam opinion indicated that the Court of Appeals for the Fifth Circuit determined that the "opinion should not be pub-

lished and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4."

The cited rule generally provides that unpublished opinions are not precedent:

> Unpublished opinions . . . are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).

On May 2, 2000, mandate issued in the appeal.

Fifteen days later in the case *Southwestern Bell Telephone Company v. City of El Paso and El Paso County Water Improvement District No. 1*, United States District Court for the Western District of Texas, El Paso Division, Civil Action No. EP-98-CA -114-EP, Judge Prado signed and entered an order which held that the Eleventh Amendment does not bar suit against the District because it is not an arm of the state.[1] Appendix at A1. The District's appeal was docketed by the Fifth Circuit on June 15, 2000 in Docket No. 00-50485.

The Fifth Circuit strives to maintain comity among panels, with subsequent panels bound by decisions of prior panels. *Macktal v. U.S. Dep't of Labor*, 171 F. 3d 323, 328 (5th Cir. 1999). Pursuant to Rule 47.5.4, however, the panel deciding the Eleventh Amendment issue in *Southwestern Bell* is not bound by the unpublished opinions of prior panels. On July 31, 2000, the Water District requested that the Publication Committee of the Fifth Circuit publish the opinion of April 10, 2000, without informing the Court that the pending *Southwestern Bell* appeal involved the same issue. Appendix at B1. The Court has de-

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[1] Judge Prado's holding is contrary to that of Judge Bunton of the same district in the underlying suit made the subject of the Pueblo's Petition for Certiorari.

cided to publish the opinion giving it precedential effect. Appendix at C1.

The precedential effect of the Fifth Circuit's decision establishes a dispositive, "bright-line" test for determining whether an entity is an arm of the state and thus entitled to Eleventh Amendment protection: It is if the state says so. Absent areas of Congressional abrogation, the Fifth Circuit's decision empowers a state to extend Eleventh Amendment protection to all political subdivisions within the state simply upon the state's say so.

CONCLUSION

The Pueblo respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

[Filed May 22, 2000]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil Action No. EP-98-CA-114-EP

SOUTHWESTERN BELL TELEPHONE COMPANY,
Plaintiff,

vs.

CITY OF EL PASO AND EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
Defendant.

ORDER

On this date the Court considered El Paso County Water Improvement District No. 1's Motion for Dismissal Pursuant to Eleventh Amendment, filed December 1, 1999 and Southwestern Bell's Response. El Paso County Water Improvement District 1's letter briefs have also been considered. Also on this date, the Court considered Southwestern Bell's Conditional Motion to Substitute Officials of El Paso County Water Improvement District No. 1, as well as the response to that motion. After careful consideration, the Court will deny the motion to dismiss and will deny the conditional motion as moot.

Background and Procedural History

Southwestern Bell Telephone Company ("SWBT"), a provider of telecommunications services holding a certificate of convenience and necessity issued by the Public Utility Commission of Texas ("PUC"), brought this suit for declaratory and injunctive relief originally against the City of El Paso ("City"). In its original petition, SWBT sought declarations that (1) a pro-

posed city ordinance that would require SWBT to pay the City 5% of all gross revenues from services to customers within El Paso violated the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 et seq., ("FTA"); (2) certain buyout provisions of a then-current ordinance as well as the proposed ordinance also violated the FTA; (3) the proposed ordinance violated the Texas Public Utilities Regulations Act, Title II of the Texas Utilities Code, ("PURA"); (4) the buy-out provisions violated Article 1416 of the Texas Revised Civil Statutes; (5) no SWBT property would be subject to the buyout provisions; and (6) the buy-out provision is unenforceable.

El Paso County Water Improvement District No. 1 ("District") was added as a Defendant in SWBT's First Amended Complaint. The District is a water improvement district operating under Article XVI, Section 59 of the Texas Constitution. At the center of the controversy between SWBT and the District is a series of irrigation ditches deeded from the federal Bureau of Reclamation to the District in January 1996. Development in the area of the ditches has resulted in an increase in demand for telephone service.

The District has established certain application procedures for entities wanting to cross the canals, laterals and ditches. These procedures require an entity, such as SWBT, to complete an application, pay an application fee of $500 and obtain a survey. Before the survey is ordered, the District's Board of Directors must preliminarily approve the application. After the survey is completed, the Board assesses a charge, which can be determined on an ad hoc basis, based on the length of the crossing.

In its claims against the District, SWBT seeks declaratory relief, arguing that (1) the District's application procedures and fees violate both FTA and PURA; (2) roads and highways crossing the District's ditches and canals are public roadways; (3) the District has no right to charge for telephone lines crossing its canals and ditches when those lines are within the right-of-way

of city or county roads; (4) the water flowing through the District's canals and ditches is public; and (5) the District has no right to charge for telephone lines crossing public waters. The District filed its counterclaim, alleging that SWBT has trespassed on its property, or alternatively, that SWBT has taken its property for public use without compensating the District.

SWBT and the City have settled their claims, leaving the District as the only defendant remaining in the case.

Standards for Eleventh Amendment Immunity

The District moves to dismiss this case on the basis that it is barred by the Eleventh Amendment. In the absence of valid Congressional abrogation or state consent, the Eleventh Amendment prohibits a plaintiff from suing a state in federal court. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2223 (1999).

The District argues that it is a branch of the state and is, therefore, immune from suit. SWBT argues that the District is more like a municipality, county or a school district, none of which are protected by Eleventh Amendment immunity, *Hess v. Port Authority Tans-Hudson Corp.*, 513 U.S. 30, 47 (1994); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1997).

In Clark v. Tarrant County, 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit established a six-factor test for determining whether an entity is a branch of the state for purposes of the Eleventh Amendment. These factors are:

1.) Whether the state statutes and case law view the agency as an arm of the state;

2.) The source of the entity's funding;

3.) The entity's degree of local autonomy;

4.) Whether the entity is concerned primarily with local, as opposed to statewide, problems;

5.) Whether the entity has the authority to sue and be sued in its own name; and

6.) Whether the entity has the right to hold and use property.

Hudson v. City of New Orleans, 174 F.3d 677, 679 (5th Cir. 1999). *See also Clark,* 798 F.2d at 744-45

However, there is another line of Fifth Circuit case law on this subject to which the District directs the Court's attention. In this line of cases, port authorities, which also operate under Article XVI, Section 59 of the Texas Constitution, are held to be immune arms of the state. *Pillsbury Co., Inc. v. Port of Corpus Christi Auth,* 66 F.3d 103, 104 (5th Cir. 1995); *Kamant v. Port Houston Auth* 702 F.2d 612 (5th Cir 1983).

The District argues that, based on these cases, the Fifth Circuit has created a bright-line test for entitles organized and operated under Article XVI, Section 59 of the Texas Constitution, and that an examination of the *Clark* factors would be inappropriate. Particularly, the District points to language in *Pillsbury* emphasizing the creation of the port authority pursuant to Article XVI, Section 59 of the Texas Constitution. *Pillsbury*, 66 F.3d at 104-05.

The Court is convinced that the language in *Pillsbury* does not have the broad significance that the District would attribute to it. The basis for the Fifth Circuit's decision in *Pillsbury* is that the Port of Corpus Christ Authority is factually and legally indistinguishable from the Port of Houston Authority, which the court in *Kamani* had previously held immune from suit under the Eleventh Amendment. *Pillsbury,* 66 F.3d at 104. Therefore, *Pillsbury* was essentially decided on the basis of stare decisis.

Kamani, too, was decided on the basis of a previous case, *McCrea v. Harris County Houston Ship Channel Navigation Dist.,* 423 F.2d 605 (5th Cir. 1970). The court in *Kamani,* in holding the Houston port immune from suit, cited *McCrea's* statement that the Port of Houston Authority was "a creature of

state law and a political subdivision of the State of Texas." *Kamani*, 702 F.2d at 613. In *McCrea*, the issue of whether the Houston port was an arm of the state for Eleventh Amendment purposes was never raised; rather, the court was describing the Harris County Houston Ship Channel Navigation Distict. *McCrea*, 423 F.2d at 607. Therefore, neither *Kamani* nor *McCrea* hold that an entity created and run under Article XVI, Section 59 of the Texas Constitution is automatically protected by the Eleventh Amendment.

Further, the context of the statement in *Pillsbury* indicates that the Fifth Circuit did not intend to create a bright-line test for Eleventh Amendment immunity. The plaintiff in *Pillsbury* had argued that Supreme Court case *Hess v. Port Authority Trans-Hudson Corp.*,513 U.S. 30 (1994), overruled *Kamani*. In *Hess*, the Supreme Court held that a bi-state railroad created by an interstate compact was not subject to Eleventh Amendment immunity. *Hess*, 513 U.S. at 38, The *Pillsbury* court distinguished the analysis in *Hess* by stating:

> We view *Hess* as a limited holding addressing the standard to be applied to bi-state entites not created pursuant to state statute. Because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* does not overrule *Kamani* or control the disposition of this appeal.

Pillsbury, 66 F.3d at 104-05.

Thus in context, the court in *Pillsbury* is not indicating that there should be a bright line rule-that everything created pursuant to a particular section in the Texas Constitution is entitled to immunity-but is instead distinguishing the facts before it from the facts before the Supreme Court in *Hess*.[1]

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[1] *Cf Flores v. Cameron County*, 92 F.3d 258, 268 (5th Cir. 1996)("analogies between like entitles cannot replace consideration of the six relevant factors"); *Lafe v.R.E. Thomason Gen. Hosp.*, 665 F 2d 724, 727 (5th

Therefore, the Court will examine the six *Clark* factors to determine the status of the District.

The six factors

The six *Clark* factors are not given equal weight, and it is common for several of the factors to weigh in favor of viewing the entity as an arm of the state and for several to weigh against it. *Hudson,* 174 F.3d at 682-83.

The source of the District's funding

Of the six *Clark* factors, the source of the entity's funding has been held to be the most important. *Hudson,* 174 F.3d at 679; *Delahoussaye v. City of New Iberia,* 937 F.2d 144, 147 (5th Cir.1991). This is essentially a question of whether the state would be liable for a judgment against the entity, *See Regents of the Univ. of Cal. v. Doe,* 519 U.S. 425, 430 (1997). The Court notes that SWBT is not seeking any monetary damages from the District.

The Distict is funded by local user fees (assessments), local taxes and bonds. *See* Tex. Water Code §49.107 (authorizing a district to levy and collect taxes for operation and maintenance); *Id.* at § 55.354 (assessments); *Id* at § 55.491 (authorizing bond election); *Id* at §55.491 (amount of the bonds should be suffcient to pay for proposed improvements); *Id* at § 55.651 *et seq.* (levying taxes to pay principal and interest on bonds).

More importantly, it appears that the District itself , and not the state, is reasonable for any judgments against it. *Harris County Flood Control Dist. v. Mihelich,* 528 S.W.2d 506 (Tex 1975); Op. Att'y Gen No. H-1111, 1978 WL 24366 (Jan 6, 1978)(both stating that a judgment against distict operating pur-

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Cir. 1982)("[a] federal court must examine the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself").

suant to Article XVI, Section 59 of the Texas Constitution should be paid from the district's maintenance fund). *See* also Tex, Water Code § 49.066(b)(a state court rendering judgment against a district may order the district to collect taxes to pay the judgment). Therefore, a judgment against the Distict would not be paid from the state treasury.

How state law views the District

Although not binding on the Court, whether state law views the entity as an alter ego of the state is relevant to the determination of Eleventh Amendment immunity. The Texas Supreme Court has held that political subdivisions created by the Texas Legislature under article XVI, section 59 of the Texas Constitution are immune from suit in Texas courts *Guillory v. Port of Houston Auth*, 845 S.W.2d 812, 812 (Tex 1993). Although the entity at issue in *Guillory* was port authority, the Texas court stated that "[w]ater improvement districts . . . are different from municipalities in that the former are created by the Legislature for general public purposes, while the latter are created by consent of their inhabitants." *Guillory,* 845 SW.2d at 814.

The Texas Supreme Court also stated that the Houston Port Authority was immmune from federal suit, based on *Kamani. Guillory*, 845 S.W. 2d a at 815. Because the same port authority was involved in both *Kamani* and *Guillory,* these statements do not persuade the Court that the District is immune under the Eleventh Amendment.

The district's degree of local autonomy

The Distict is run by a Board of Dirctors consisting of five locally elected directors who own land within the District. Tex. Water Code §§ 55.101; 55.102. The Board of Directors is permitted to purchase or make improvements and facilities for irrigation without state approval. *Id.* at § 55.163. Likewise, the District is authorized to enter into contracts with the United States without state approval. *Id.* at § 55.185. The District can also set its own fees, sell its property and annex land. *Id.* at §§49.212,

49.226, 49.301-.302. On the other hand, before a district can issue bonds to fund a project, the project must be approved by the Texas Natural Resource Conservation Commission. *Id.* at § 49.181. Nevertheless, on the whole, the District appears to have a significant amount of local autonomy.

Whether the district is concerned primarily with local, as opposed to statewide, problems

Although the use of water is of concern to the entire state of Texas, the District's powers appear limited to address issues of local concern The Court notes the Texas Supreme Court's statement that entities created under Article XVI, Section 59 of the Texas Constitution are for "general public purposes." *Guillory*, 845 S.W. 2d at 814. Nevertheless, on the whole, it appears that the District is primarily concerned with the area within the District itself. The purposes of a water improvement district are:

> (a) to provide for irrigation of land within its boundaries.
>
> (b) to furnish water for domestic power, and commercial purposes.
>
> (c) to cooperate with the United States under federal reclamation laws for the purpose of construction, operation and maintenance of irrigation and drainage facilities necessary to maintain the land's irrgabitily and to assume debts to the United States on account of district lands

See Tex. Water Code § 55.161.

These purposes strongly suggest that the District is primarily concerned with local problems.

Whether the enity has the right to sue and be sued in its own name & whether the entiy has the right to hold and use property

These two factors are frequently considered to be the least important. *See Hudson*, 174 F.3d at 682. A water district is per-

mitted to sue in its own name. *See* Tex. Water Code § 49.066(a)(a district, including a water improvement district, may sue and be sued); *Id.* at § 55.504 (before selling bonds, a water improvement district is to bring suit in district court); *City of Pelly v. Harris County Water Control and Improvement Dist. No 7*, 195 S.W.2d 241 (Tex. Civ. App.—Galveston 1946)(rev'd on other grounds).

Likewise , a water distinct can acquire property. Tex. Water Code § 49.218 ; *See also Id.* at 49.222 (eminent domain); *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955) (the District has "a broad right of eminent domain").

Motion to Substitute Plaintiffs

In light of the Court's decision, it is unnecessary to decide whether SWBT could substitute the District's directors as defendants. The Court notes, however, that *Ex Parte Young* permits suit for prospective declaratory or injunctive relief against a state officer in his or her official capacity. *Edelman v. Jordan*, 415 U.S 651 (1974); Ex Parte Young, 209 U.S. 123 (1908). Based on the nature of the suit and the prospective relief sought in this case, the *Ex Parte Young* doctrine would seem applicable. Therefore, if the District were considered an arm of the state for Eleventh Amendment purposes, the suit would be permitted to go forward by substituting Directors of the District for the District itself.

Conclusion

ACCORDINGLY, it is ORDERED that El Paso County Water Improvement District No. 1's Motion for Dismissal Pursuant to Eleventh Amendment (Docket No. 49) is DENIED. It is also ORDERED that Southwestern Bell's Conditional Motion to Substitute Officials of El Paso County Water Improvement District No. 1 (Docket No. 55) is DENIED AS MOOT.

SIGNED and ENTERED this 17th day of May, 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

[Received Aug. 1, 2000]

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July 31, 2000

Via Federal Express
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Attention: Publication Committee

Re: Ysleta del Sur Pueblo v. El Paso County Water Improvement Districrt No. 1
No. 98-51203; D.C. Docket No. P-98-CV-27

Dear Court of Appeals:

I represent El Paso County Water Improvement District No. 1, and I am an attorney of record in the above action. On April 10, 2000 the Court of Appeals for the Fifth Circuit issued an important opinion in such action.

The opinion has not been published. Enclosed is a copy of the opinion.

The Plaintiff/Appellant, Ysleta del Sur Pueblo, has recently filed a petition for writ of certiorari.

Although the opinion is brief, the law set forth applies to all political subdivisions of the State of Texas existing pursuant to Article XVI, Section 59 of the Constitution of the State of Texas. Among such political subdivisions are Water Control

and Improvement Districts, Underground Water Conservation Districts, Fresh Water Supply Districts, Municipal Utility Districts, Water Improvement Districts, Drainage Districts, Levee Improvement Districts, Irrigation Districts, and Navigation Districts.

Today I received a telephone call about the opinion from an attorney representing the Metropolitan Water District of Southern California. Also enclosed is a copy of an article from the June 2000 edition of Western Water Law which discusses opinion.

On behalf of El Paso County Water Improvement District No. 1, I respectfully request that you publish the opinion. I submit that there is so much interest in this opinion that it needs to be published.

Thank you for your consideration.

Yours very truly,
/s/ James M. Speer, Jr.
JAMES M. SPEER, JR.

Cc: Ronald Jackson
Attorney for Plaintiff/Appellant
w/enclosures

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
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August 9, 2000

TO ALL COUNSEL:

No. 98-51203–Pueblo v El Paso City Water
(D.C. No. P-98-CV-27)

Please be advised that the court has decided to publish the Opinion in the above entitled and numbered cause.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Joseph Armato
JOSEPH ARMATO
Deputy Clerk

Enclosures:

Honorable Lucius D. Bunton, III
Mr. Glenn Jarvis
Mr. Ronald Lee Jackson
Mr.Scott Warren Johnson
Mr. James M. Speer